Supreme Court, U.S.
FILED
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No. _____

IN THE

Supreme Court of the United States

VIOLET SERRATO,

Petitioner,

-v-

JOSHUA KAPLAN, MARLENE REYNOLDS, JOANNE NAVIN, AND BRYAN BENNER

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Circuit Court of Appeals, in claims brought pursuant to 42 U.S.C. §§ 1983 for alleged retaliation in violation of the First and Fourteenth Amendments, correctly upheld the District Court's finding that Plaintiff employee's speech, in which she reported death threats made against her by a co-worker, and expressed concerns for her personal safety, did not touch upon a matter of public concern.

PARTIES TO THE PROCEEDING

Petitioner is Violet Serrato. She was Plaintiff in the District Court and Appellant in the Court of Appeals.

Respondents are Joshua Kaplan, Marlene Reynolds, Joanne Navin, and Bryan Benner, in their personal capacities. They were Defendants in the District Court and Appellees in the Court of Appeals.

There are no corporate respondents.

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The opinion of the Court of Appeals (App. A) is reported at .104 Fed.Appx. 509

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BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on July 7, 2004.

On July 21, 2004, Petitioner filed a Petition for Rehearing Before Original Panel. On July 29, 2004, the Court of Appeals filed an order summarily denying the petition for rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. 1

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

In an era where workplace violence has become almost routine, the District Court for the Western District of Ohio, and the Sixth Circuit Court of Appeals in upholding the District Court, have struck a serious blow to workers' abilities to express safety concerns without the threat of disciplinary action. Petitioner Violet Serrato was employed at Bowling Green State University in the Department of Student Health Services when a co-worker made a death threat against her in the presence of several people. After a brief suspension, the co-worker was allowed to return to work, where she continued to come into contact with Petitioner. When Petitioner expressed concerns for her safety, she was told that she would have to live with it or find other employment. When she continued to express concern for her safety, her supervisors took retaliatory actions against her. She eventually brought a complaint against defendants, the university and her supervisors, pursuant to 42 U.S.C. § 1983, for violation of her First Amendment rights. The District Court dismissed the University and the individual Defendants in their official capacities, and that order was not challenged in the Court of Appeals. The remaining Defendants filed a Motion for Summary Judgment, and in spite of voluminous evidence that safety was a primary concern expressed in Petitioner's speech, the District Court granted Summary Judgment to all Defendants, and the Court of Appeals upheld that decision.

The District Court held, and the Sixth Circuit agreed, that Petitioner's bundle of speech did not touch upon a matter of public concern. As set forth in some detail below, the record establishes, especially under summary judgment standards, that Petitioner's speech, although it included some expressions of discontent with the limited disciplinary action taken against the co-worker, was centered upon safety concerns. The courts' refusal to recognize that this mixture of speech containing both safety concerns and internal disciplinary concerns touched

"upon a matter of public concern" is a departure from generally well-settled legal principles. Furthermore, it will have a chilling effect on the exercise of First Amendment rights in the workplace, and may have serious implications for workplace safety, as workers will hesitate to express safety concerns, lest they be presented in an insufficiently pure form to survive the narrow opening left by the Court of Appeals.

I. Factual Background

Petitioner Violet Serrato worked as a full-time clerical specialist at Defendant Bowling Green State University's ("BGSU's") Student Health Services ("SHS"). In early 1995, Petitioner and another employee, an individual named Cheryl Schick, were the only applicants for another full-time clerical specialist position at SHS. (JA pg. 153). In the hearing of at least two employees, Schick stated that she would bring a gun into work and that if she didn't get the position, there would be more openings at the front desk, and that she was going to kill her. (JA. pp. 151-152, 163-165). For purposes of summary judgment, Appellees did not dispute that Schick made the death threat. There is some evidence that such comments were made on more than one occasion. (JA. pg. 153-154). Petitioner first learned about the threat when she heard Dr. Kaplan telling other employees that Schick did not mean the threats and that nothing was going to be done about them. (JA pg. 163).

Petitioner and her supervisor at the time, Sherry Beeker, went to Kaplan and expressed concern about their safety, and were told by Kaplan to contact campus security to address their safety concerns. (JA pg. 163-164). They did so, and campus security referred them to BGSU Human Resources. In accordance with the advice of campus security, Petitioner reported her concerns to Human Resources. When Dr. Kaplan learned that, in accordance with campus security's advice, Petitioner had reported the matter to human resources, he

became furious and began a pattern of harassment and retaliation. (JA pp. 167, 170, 182-183). When Petitioner expressed concern over the continued presence of Schick in areas near Petitioner, Kaplan told her that if she was not happy with how he addressed the situation she could find employment elsewhere. (JA pp. 183, 266). Subsequently, on February 13, 1995, Serrato, and Ruth Maas, Karen Wasson, and Sherry Beeker prepared and signed a memorandum to Kaplan expressing their safety concerns. (JA pp. 191, 270).

Besides the above-referenced memorandum, referred to as a letter by the District Court and the Court of Appeals, Serrato expressed her concerns for her safety to Kaplan on numerous occasions. (JA pg. 171). Her expressions of safety concerns to Kaplan continued until she (Serrato) left the health center. (JA pg. 162-171). After Serrato began to be harassed because of her expression of concern for her safety, she also expressed concerns over the harassment, but the main focus of her expressions continued to be safety concerns. *Ibid.* At no time did the main focus of her expressions become retaliation or appropriate discipline for Cheryl Schick. *Ibid.*

While Cheryl Schick was eventually transferred out of SHS, she remained in the building and would come in to Petitioner's area until November, 1995. (JA pg. 189-190). In October 1995, Schick intentionally ran into Petitioner with her shoulder. Specifically, Schick came up behind Petitioner, and when she went behind Petitioner "she took her shoulder and she ran it into [her] left shoulder." (JA pg. 154). In spite of Schick's death threat to front desk employees, she was not kept away from the front desk area. (JA pg. 192).

Tonia Stewart was the Associate to the Vice President for Student Affairs at BGSU from July 1994 to July 1997. She was the Associate Vice President for Student Affairs at BGSU from July 1997 to June 1999. (JA pg. 369). At the time she became Associate Vice President for Student Affairs in July 1997 she became the immediate supervisor for Appellee

Kaplan, and was his immediate supervisor for about one year. Stewart is familiar with the workings of SHS, including the functions performed by Serrato and the other employees, during the time period that she was Kaplan's immediate supervisor. (JA pg. 369). During the time that Stewart was Kaplan's immediate supervisor Stewart recommended to Edward Whipple, Vice President for Student Affairs for BGSU, that Kaplan's contract at BGSU not be renewed. Stewart's recommendation was not followed, and shortly thereafter, she was removed as his immediate supervisor. (JA pg. 369). The reason Stewart recommended that Kaplan's contract not be renewed is because she had concluded that he was retaliating against Serrato for expressing concerns about her safety in the workplace. (JA pg. 369-370).

II. Proceedings Below

On December 5, 2001, Petitioner, acting pursuant to 42 U.S.C. § 1983, filed her complaint against Bowling Green State University and against the individual defendants, in both their official and their personal capacities, for violation of her First Amendment rights.

On February 28, 2002, on Eleventh Amendment grounds, the District Court granted Defendants' motion to dismiss the University, and to dismiss the individual defendants in their official capacities only. That ruling has not been appealed.

After a period of discovery, Defendants filed a Motion for Summary Judgment on November 25, 2002. Defendants argued that Petitioner's statements did not constitute matters of public concern. Defendants also argued that, as to each defendant, no adverse action had been taken against Petitioner, and that any adverse action against Petitioner was not motivated by any protected speech. Defendants next argued that even if Petitioner's speech related to matters of public concern, their

interest in promoting the efficiency of the public services outweighed Petitioner's speech rights. Finally, each defendant argued that he or she was protected by qualified immunity.

In response, Petitioner argued that her statements expressing concern over the death threat and over Dr. Kaplan's refusal to keep Schick away from Petitioner related to matters of public concern, and that the fact that she also expressed dismay over the lack of disciplinary action did not somehow turn the former statements into matters of purely private concern. She pointed out adverse actions taken against her by each defendant, and provided evidence that in each case, the adverse actions were related to her protected speech. She provided evidence that any disruption in the workplace related to Petitioner's communications was not as a result of Petitioner's communications, but was as a result of defendants', and particularly Dr. Kaplan's, course of harassment against Petitioner. Finally, Petitioner argued that the rights she was asserting were clearly recognized at the time they were violated by defendants, so that defendants were not protected by qualified immunity.

The District Court granted Defendants' motion on March 24, 2003, holding that "The subject of Plaintiff's speech was an internal employee dispute. An internal employee grievance is the quintessential example of a matter of private concern," (Pet. App. 25), and that "Taking the Plaintiff's statements in the context in which they were made, it is plain that they did not relate to a matter of public concern." (Pet. App. 27).

The District Court's judgment was appealed to the Sixth Circuit on April 22, 2003. Following appropriate briefing, the Court of Appeals on July 9, 2004, affirmed the judgment of the District Court. Petitioner timely filed a Petition for Panel Rehearing, which was denied July 29, 2004.

The District Court in many aspects correctly set forth the law. The court noted that under ***Connick v. Myers*** (1983), 461

U.S. 138, 103 S.Ct. 1684, the "key question is not whether a person is speaking in his role as an employee or a citizen, but whether the employee's speech in fact touches on matters of public concern." (Pet. App. 24). Thus, even if a public employee were acting out of a private motive with no intent to air her speech publicly, so long as the speech relates to matters of "political, social, or other concern to the community," as opposed to matters "only of personal interest," it is considered as touching upon matters of public concern. ***Cockrel v. Shelby County Sch. Dist.***, 270 F.3d 1036, 1052 (6th Cir. 2001), citing ***Connick***, 461 U.S. at 146-49, 103 S.Ct. 1684.

The District Court went on to observe that it was irrelevant to the case that Serrato arguably had a personal motive--her personal safety--in her speech. (Pet. App. 24). The fundamental distinction recognized in ***Connick*** is the distinction between matters of public concern and matters only of personal interest. What is relevant is the subject of plaintiff's complaint. ***Chappel v. Montgomery County Fire Prot.***, 131 F.3d 564, 575 (6th Cir.1997). (Pet. App. 24).

However, on the crucial question of whether the speech at issue, petitioner's expressions of concern for her personal safety, touched upon matters of public concern, the court equated plaintiff's speech with the speech at issue in ***Black v. Columbus Pub. Sch.***, 124 F. Supp. 2d 550 (S.D. Ohio 2000). (Pet. App. 26). In ***Black***, a school employee claimed retaliation for her allegations that the principal of her school was having an affair with a parent volunteer. The district court found that the employee's speech did not touch on matters of public concern, because, in context, it was motivated by personal concerns, "not based on a desire to alleviate a matter of public concern." Inherent in the District Court's reliance upon ***Black*** is the view that there is no distinction, for First Amendment purposes, between personal concern over another person's romantic liaisons, and concern for personal safety in the light of a workplace death threat.

Thus, the key legal issue raised by the District Court's opinion is whether expressions of concern for one's personal safety, as opposed to the safety of the public at large, touches upon matters of public concern, such that the First Amendment is implicated.

The District Court's opinion is couched in language suggesting that petitioner's speech involved not concern for her personal safety, but a personal desire to see Cheryl Schick fired. However, that this is not the ultimate holding of the District Court's opinion is evident from the fact that the court did not cite a single piece of evidence suggesting that that was petitioner's intent, or that it formed any part of her speech. Indeed, the words "fire," "discharge," or "terminate," or any form thereof, or any other euphemism for the termination of employment, attributable to petitioner or her co-workers, does not even appear in the opinion in relationship to Cheryl Schick.

The closest thing to any statement suggesting that Petitioner had the slightest interest in seeing Cheryl Schick fired appears in the letter to Kaplan signed by Cheryl and several co-workers. The District Court culled out the following paragraph from the letter:

> Action should have been taken immediately to remove [Schick] *from the SHS to alleviate anxiety which many employees felt over this.* Really it is our opinion that when these comments were brought to your attention and then confirmed by other staff, *removal, transfer or other action* should have been immediate and swift.... We as employees under your supervision want you to take her threats against people serious and follow through with disciplinary action.
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> Emphasis added. (Pet. App. 28).

In its opinion, the District Court highlighted the phrase, "follow through with disciplinary action" as evidence that Petitioner's communications did not touch upon matters of public concern. (Pet. App. 28). But two things stand out here. First, in this paragraph, the most harmful (to Petitioner) evidence the court could find, its authors sought only removal from the SHS, transfer, or other action. At most, it could be inferred that Petitioner and her co-workers would not have objected to Schick's termination, but certainly the letter does not as a matter of law seek Schick's discharge. Secondly, this, the most unfavorable (to Petitioner) portion of the letter, seeks disciplinary action not for its own sake, or for revenge, but to alleviate the anxiety felt by its authors and other employees over the death threat.

A closer examination of the letter is helpful in understanding the implicit holding of the court: that the expressions of personal concern over safety, as a matter of law do not constitute speech touching on matters of public concern, especially where there are concurrent statements of private interest.[1] The letter opened with the following paragraph:

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[1] Neither the District Court nor the Court of Appeals explained why the safety concerns expressed in the letter, and the voluminous deposition testimony of Petitioner as to her frequent expressions of safety concerns, did not create a material question of fact. The expressions of safety concern were explicitly set forth in the record, and, of course, neither court could weigh the evidence in deciding the Motion for Summary Judgment. In that light, it is clear that the Sixth Circuit's statement that Petitioner's allegations were only "based on Plaintiff's personal desire to see Schick dismissed," and the District Court's statement that Petitioner's speech arose only out of "a desire to see Schick fired," must be understood as implicit holdings either that speech which

> The events of the last few days have really been stressful and anxiety filled for many of us at the SHS, a few of us in particular. We do not want to come to work feeling fearful about our safety and well-being. This anxiety and uneasiness doesn't go away upon leaving work either. None of us here should have to feel afraid; nor should our husbands and families feel worried about us going off to work.
>
> (JA pg. 270).

The clear focus of this paragraph is obviously on safety concerns, and on the anxiety that the continued presence of the threatening co-worker brought to Petitioner and other signatories.

However, the District Court failed to see the letter as creating a material factual dispute, presumably either because it also contained the "disciplinary action" language, or because, in the court's view, expressions of purely personal safety concerns cannot ever constitute matters of public concern.

Because the District Court could not and did not purport to weigh the evidence, its holding that "[i]n all of plaintiff's written and oral communications with defendants, she appears to have been pursuing a personal interest: namely, a desire to see Schick fired," (Pet. App. 29), must be understood as an implicit requirement that in order to be protected, the speech must be purely of public concern, and that speech touching on matters of public concern will be disregarded where accompanied by speech expressing private concerns, or,

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would otherwise constitute matters of public concern, do not do so when accompanied by speech of purely personal concern, or that expressions of personal safety concerns do not in any event constitute matters of public concern.

alternatively, that expressions of concern for personal safety as a matter of law do not touch on matters of public concern.

Similarly, the District Court cited a portion of Petitioner's deposition in which she recalls that she "explained to [Dr. Kaplan] in great detail how I felt this matter was not handled properly and the main concern had been more toward keeping bad [public relations] from getting out than the safety of the employees[.]" (Pet. App. 28). The District Court relied upon this statement, and statements made *by* Dr. Kaplan *to* Petitioner, to find that Petitioner was only "pursuing a personal interest: namely, a desire to see Schick fired." (Pet. App. 29).

The District Court also suggested that petitioner's reporting of the death threat to human resources was not an expression of safety concern. The court states:

> [P]laintiff alleges that the retaliation against her began when she contacted Human Resources to complain about Schick on February 10, 1995. When plaintiff called Human Resources, she could not have had the purpose of protecting herself or the public, nor could a call to Human Resources have had that effect. Taking plaintiff's statements in context, plaintiff's call to Human Resources was not regarding a matter of public concern, but instead regarding the internal disciplinary decisions of her superiors.
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> (Pet. App. 27).

However, this also could not have been a basis of the District Court's finding that petitioner's speech was not a matter of public concern, because, as the District Court itself recognized in its factual recitation, Petitioner only reported the matter to Human Resources at the direction of Campus

Security, to whom Kaplan himself had directed her. (Pet. App. 18).

Thus the District Court's rejection of petitioner's many expressions of safety concerns, and of those portions of the letter to Dr. Kaplan that spoke of safety concerns, can only be seen as a rejection of personal safety concerns as a matter of public concern such as would invoke the protections of the First Amendment.[2]

In the same way, the Court of Appeals, relying substantially on the same evidence relied upon by the District Court, rejected petitioner's argument that the numerous oral and written expressions of concern for her safety touched upon matters of public concern. However, the court set forth a little more clearly, if still somewhat obliquely, its legal basis for affirming the District Court. First, the court distinguished its opinion in ***Banks v. Wolfe County Board of Education***, 330 F.3d 888 (6th Cir.2003), from the instant case, by observing that the plaintiff in Banks challenged the defendants' "policies and procedures" and "what she perceived to be violations of state policy by the defendants." (Pet. App. 9). In the instant case, Petitioner was not challenging policies and procedures, and was not even primarily expressing concern for the safety of the public in general, but was primarily expressing concern for her own safety. More to the point, however, in footnote 1 of its

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The District Court also held that, even if Appellant's speech touched on a matter of public concern, it was not constitutionally protected because her interest in speaking did not outweigh the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. However, having held that the speech at issue did not touch on matters of public concern, the Court of Appeals did not address this issue.

opinion, the court in the instant case summarized its legal holding as follows:

> Plaintiff's alleged retaliatory treatment came about *because she voiced her personal concern about her personal safety and the safety of others.* However, Plaintiff's alleged safety concern *arose in the context of a personal employment dispute*, and the allegations were more personal in nature, and *only tangentially concerned public safety.*
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> Emphasis added. (Pet. App. 11).

Hence, in spite of certain language in the opinion suggesting that petitioner's interest was in seeing Cheryl Schick fired, for which no evidence exists, it is clear that ultimately the Court of Appeals recognized that Petitioner's speech was based upon concerns for her personal safety and the safety of co-workers. The court's legal holding therefore, was that expressions of concern for personal safety, as opposed to safety of the public at large, as a matter of law do not touch upon matters of public concern such as would invoke the protections of the First Amendment.

REASONS FOR GRANTING THE PETITION

There can be no serious doubt that the case presents an issue of great national importance. Furthermore, the issue over which petitioner seeks review, whether expressions of safety concerns over workplace death threats "touch on matters of public concern" such that the protections of the First Amendment may be invoked, so far as petitioner has been able to determine, has never been addressed by this court, or by any

federal court. The continued increase in workplace shooting deaths makes this a vital topic to millions of Americans.

A recent study found that workplace violence was the second leading cause of work-related deaths in the state of Missouri, with 30 of the state's 148 workplace deaths in 2000 being the result of assaults and violent acts.[3] According to Bob Gibson, vice president of Loss Prevention and Administration for Missouri Employers Mutual Insurance, employee involvement is key to preventing workplace killings. *Ibid.*

In May, 2004, the advocacy group Handgun-Free America released a comprehensive report analyzing workplace shootings that have occurred over the last decade. The report, Terror Nine to Five: Guns in the American Workplace, 1994-2003, reviewed 164 workplace shootings and found a steady increase over the last five years in the number of shootings. In addition, between 2002 and 2003, the data showed an increase from 25 workplace shootings to 45 shootings, and an increase in the number of people killed in these shootings from 33 to 69. Data from the first half of 2004 show that there were 26 incidents of workplace shootings by the end of June, compared with 5 similar incidents in 2003.[4]

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3 http://www.fishersafetyshowplace.com/full_story.php?WID=10288, FISHER SAFETY SHOWPLACE, Workplace Violence Second-Leading Cause of Work-Related Deaths in Missouri

4 http://occupationalhazards.com/articles/12023, "Workplace Shootings Responsible for 290 Deaths in Past Decade."

Governmental studies have found similarly.

> Recently, [employees], as well as supervisors and managers, have become all too frequent victims of assaults or other violent acts in the workplace which entail a substantial risk of physical or emotional harm. Many of these assaults result in fatal injury, but an even greater number result in nonfatal injury, or in the threat of injury, which can lead to medical treatment, missed work, lost wages and decreased productivity.
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> * * *
>
> [S]trong management commitment, and the day-to-day involvement of managers, supervisors, employees and labor unions, is required to reduce the risk of workplace violence.

Cal/OSHA Guidelines for Workplace Security, March 30, 1993.[5]

Workplace violence in health-care facilities is of particular concern:

> According to the Bureau of Labor Statistics (1993), homicide accounted for 17% of the 6083 fatal work injuries in 1992, more than three deaths each day in the United States. Violence is the leading cause of fatal occupational injuries in women and the first, second, or third leading cause of death for all workers depending on the

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5 http://www.dir.ca.gov/dosh/dosh_publications/worksecurity.html

area reporting, Bureau of Labor Statistics, Census on Fatal Occupational Injuries (1994).

Violence in the health care industry is endemic. Although it is increasing in severity and frequency, violence against employees in areas such as psychiatric facilities, community mental health clinics, infirmaries in corrections departments, pharmacies and community care facilities has been a serious problem for many years. Health care workers are at risk for both fatal and non-fatal violence-related injuries. Goodman et al. (1994) found that between 1980 and 1990, 106 occupational violence deaths occurred among the following health care workers: 27 pharmacists, 26 physicians, 18 registered nurses, 17 nurses' aides, and 18 health care workers in other occupational categories.

Bureau of Labor Statistics data for 1993 revealed that health care workers have the highest incidence of assault injuries. In 1989, Carmel and Hunter found that the nursing staff at a psychiatric hospital sustained 16 assaults per 100 employees per year. This rate, which includes any assault-related injuries, compares with 8.3 injuries of all types per 100 full time workers in all industries and 14.2 per 100 full time workers in the construction industry, Bureau of Labor Statistics (1991). Fox et al.(1994) found that in 1993, nurses in several agencies had the highest rate of injury from workplace violence in a group of twenty-six Federal Government agencies studied for injury rates. Assaults on health care workers are found

in all areas of practice and constitute a serious hazard.

Guidelines For Workplace Violence Prevention Programs For Health Care Workers in Institutional And Community Settings, June 21, 1995.[6]

Such findings are legion, and are hardly disputed.

The implicit holding of the District Court for the Northern District of Ohio, affirmed by the Sixth Circuit Court of Appeals, that concern for personal safety does not touch on a matter of public concern, overlooks the truism that workplace threats to individuals are threats to the public. According to the Workplace Violence Prevention Program taught at the College of Engineering and Engineering Technology, Northern Illinois University, assaults at work cost 500,000 employees 1,175,100 lost work days each year, at an annual cost of lost wages totaling more than $55 million. The study further found that the impact is measured in billions of dollars when the cost of productivity, legal expenses, property damage, diminished public image, increased security, and other factors are included.[7] To be sure, the greater part of that number involves parking lot assaults and the like, but that fact cannot diminish the seriousness of the loss of life resulting from shootings by workers or former workers inside public and private institutions.

Workplace deaths threats are qualitatively different from the types of workplace personal concerns previously found not to implicate the First Amendment. For example, as noted above, in ***Black v. Columbus Pub. Sch.***, relied upon by the

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6 http://www.work911.com/cgi-bin/links/jump.cgi?ID=1657

7 http://www.ceet.niu.edu/depts/tech/asse/tech434/workviol.doc

District Court, the speech at issue involved no threat to the speaker but only alleged that the principal of her school was having an affair with a parent volunteer. In ***United States v. Nat'l Treasury Employees Union***, 513 U.S. 454, 466, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995), relied upon by the Court of Appeals, the speech at issue involved only matters pertaining to dissatisfaction with the employee's workplace duties.

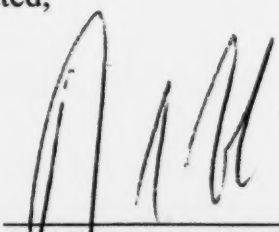
As noted earlier, so far as Petitioner has been able to determine, no federal court has addressed the issue squarely before the court in this case: whether expressions of safety concerns arising from workplace threats "touch on matters of public concern" such that the protections of the First Amendment may be invoked. The instant case presents an ideal vehicle for answering that question. That the death threat was made and was directed against petitioner is undisputed. Furthermore, the record clearly demonstrates that the main concern for petitioner was her safety, and that any interest in "disciplinary action" against the threatening co-worker was only as it related to petitioner's safety, e.g., that the co-worker be reassigned to another department.

The decisions below present grave threats to the ability of workers to make reasonable efforts to ensure their safety in the face of threats by co-workers, without fear of adverse consequences to themselves, the intended victims. Reversal of the judgments below will send a powerful message to employers that workplace threats of violence must be taken seriously, and that employees who are the targets of such threats cannot be disciplined for their reasonable expressions of concern for their safety.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

United States Court of Appeals,
Sixth Circuit.

Violet **SERRATO,** Plaintiff-Appellant,
v.
BOWLING GREEN STATE UNIVERSITY; Joshua Kaplan, Marlene Reynolds; Joanne Navin; Byran Benner, Defendants-Appellees.

No. 03-3620.

Decided July 7, 2004.
Rehearing Denied July 29, 2004.

Thomas A. Sobecki, Toledo, OH, for Plaintiff-Appellant.

Janine Thompson Avila, Tammy Geiger Lavalette, Connelly, Jackson & Collier, Toledo, OH, for Defendants-Appellees.

Before: KEITH and CLAY, Circuit Judges; and OBERDORFER, District Judge. [FN*]

FN* The Honorable Louis F. Oberdorfer, United States District Judge for the District of Columbia, sitting by designation.

CLAY, Circuit Judge.

Plaintiff appeals the district court's order granting Defendants summary judgment on claims brought pursuant to 42 U.S.C. § 1983 for alleged retaliation in violation of the First and Fourteenth Amendments. Plaintiff contends that the district court erred in determining that her speech in which she reported alleged death threats made against her by a co-worker did not

touch upon a matter of public concern. For the reasons set forth below, we **AFFIRM** the district court's order.

BACKGROUND

Procedural History

On December 5, 2001, Plaintiff filed a complaint pursuant to 42 U.S.C. § 1983 in the United States District Court for the Northern District of Ohio, alleging violations by Defendants of her First and Fourteenth Amendment rights to free speech. In their responsive pleading. Defendants asserted that Plaintiff's complaint should be dismissed for failure to state a claim upon which relief may be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). On February 28, 2002, the district court granted Defendants' motion to dismiss the complaint against them in their official capacities. After a period of discovery, on November 25, 2002, Defendants filed a motion for summary judgment as to Plaintiff's claim against them in their individual capacities. The district court granted Defendants' motion for summary judgment in a written order dated March 24, 2003. Plaintiff then filed a timely appeal with this Court on April 22, 2003.

Facts

Plaintiff Violet **Serrato** worked as a full-time clerical specialist at Defendant Bowling Green State University's ("BGSU's") Student Health Services ("SHS"). In early 1995, Plaintiff and another employee, an individual named Cheryl Schick, were the only applicants for another full-time clerical specialist position at SHS. Deposition testimony from several SHS employees revealed that Schick was angry that Plaintiff was competing with her for the job and remarked publicly that she (Schick)

would bring a gun in and kill Plaintiff if Schick did not get the position. It is undisputed that, until Plaintiff learned of the threat Schick made against her. Plaintiff had never filed a grievance or formal complaint against anyone in BGSU. It is further undisputed that on learning of the threat against Plaintiff. Defendant Joshua Kaplan. SHS's medical director, called Schick into his office and Schick admitted to making the statement but stated she did not have a gun and did not mean what she said. Further, Kaplan told Schick he planned on contacting the police regarding the threat and sent Schick home for the day. Plaintiff learned about the threat made against her after hearing Kaplan telling other SHS employees that Schick's threat against Plaintiff was harmless. Plaintiff and her supervisor at the time, Sherry Beeker, expressed concern about their safety, and were told by Kaplan to contact campus security to address their concerns. Plaintiff and Beeker did contact campus security, who referred them to BGSU Human Resources. Plaintiff claims that after she reported her concern to Human Resources, the harassment and retaliation by Defendants begun "and never stopped." (Plaintiff's Br. at 5).

Plaintiff continued to complain. Plaintiff claims Kaplan told her that if she was not happy with how he addressed the situation she could find employment elsewhere. On February 13, 1995, Plaintiff and several of her co-workers at SHS signed a memorandum to Kaplan expressing their safety concern regarding Schick. Plaintiff claims that while she and other SHS workers expressed safety concerns about Schick's death threat, Kaplan singled her out "for harassment and retaliation." (Plaintiff's Br. at 6). According to Plaintiff, after she underwent a hysterectomy in the latter part of 1996. Kaplan informed her that she could not come back to work on less than a full-time basis, even though other employees who sought medical attention were allowed to return on a part-time basis. Plaintiff asserts that only after she complained to higher authorities did

Kaplan permit her to return to work on a part-time basis. She further contends that when Kaplan found out that she supervised several students as part of her responsibilities at SHS. he eliminated the student positions. It is Plaintiff's belief that Kaplan's act of eliminating the student positions was done to adversely affect Plaintiff's work environment because Plaintiff relied heavily on the students to assist with her work. Plaintiff claims that in spite of Schick's death threat against her, Schick was not immediately removed from SHS and on one occasion Schick deliberately "took her shoulder and ran it into [Plaintiff's] left shoulder." (Plaintiff's Br. at 8).

Defendant Joanne Navin replaced Sherry Beeker as Plaintiff's supervisor in 1997; Navin's supervisor was Kaplan. Plaintiff expressed to Navin her concern over the retaliatory treatment she felt she was receiving by Kaplan after she had reported her safety concerns about Schick's threat to Human Resources. When Defendant Marlene Reynolds replaced Navin as clerical supervisor. Plaintiff also expressed to Reynolds her concern about her safety and the retaliatory treatment she felt she was experiencing. Plaintiff contends that Navin ordered her to get back to work when Plaintiff expressed her safety concern to Navin. Plaintiff further asserts that Reynolds stopped talking to her altogether after Reynolds request for an additional hour a day of part-time help was declined by Kaplan--Reynolds apparently blamed Plaintiff for Kaplan's rejection of her request. Plaintiff voluntarily left SHS in February 2000, citing the recommendation of her physician as the reason for her departure; she remained unemployed for a year until she took another position at BGSU. After returning to BGSU in a new capacity, Plaintiff claims Defendant Bryan Brenner, a BGSU employee, swerved a car in her direction as she crossed a campus street on May 7, 2001. According to Plaintiff, she noticed Brenner in the vehicle "looking straight ahead and [ ] laughing" after he drove by her. (J.A. at 252).

Tonia Stewart was the Associate to the Vice President for Student Affairs at BGSU from July 1994 to July 1997, and Associate Vice President for Student Affairs from July 1997 to June 1999. Stewart was the immediate supervisor of Kaplan in her capacity as Associate Vice President for Student Affairs. In her affidavit, Stewart recommended that Kaplan's contract with BGSU not be renewed because he was retaliating against Plaintiff for expressing concerns about her safety at SHS. The record reveals that Kaplan thought Plaintiff was overreacting to Schick's threat that was not made directly to Plaintiff: therefore. Kaplan only reprimanded Schick, despite the expressed concerns of other SHS workers who feared for their safety because of Schick's threat. According to Plaintiff, Defendants retaliated against her because she spoke out against the threat that was made against her by Schick. The district court found that Plaintiff had not stated a claim for violation of her constitutional right of free speech pursuant to 42 U.S.C. § 1983 and granted Defendants' motion for summary judgment. It is from that disposition that Plaintiff now appeals.

DISCUSSION

Plaintiff argues that the district court failed to construe the evidence in the record in her favor, contrary to summary judgment principles. Plaintiff contends that had the district court favorably construed the record, it would have held that the individual Defendants violated her First and Fourteenth Amendment rights to free speech by retaliating against her because she expressed concern for her safety in the workplace.

This Court reviews a grant of summary judgment *de novo*. *Hamby v. Neel,* 368 F.3d 549, 556 (6th Cir.2004) (citations omitted). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In considering a summary judgment motion, all facts must be viewed in the light most favorable to the party opposing summary judgment. *See id.* Settled principles also dictate that once a movant has satisfied his or her burden demonstrating an absence of evidence supporting the non-movant's case. see *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), the non-movant "may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue of material fact for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

As a threshold matter, we note that to state a claim pursuant to § 1983, Plaintiff must show that she (1) "was deprived of a right secured by the Constitution or laws of the United States and that (2) the deprivation was caused by someone acting under color of state law." *Perry v. McGinnis,* 209 F.3d 597, 603 (6th Cir.2000) (citing 42 U.S.C. § 1983). To establish a prima facie case for retaliation for exercise of First Amendment rights, Plaintiff must establish that (1) she was engaged in a constitutionally protected activity: (2) that Defendants' adverse action caused her to suffer an injury that would seriously affect a person of "ordinary firmness from continuing to engage in that activity"; and (3) that the adverse action was motivated "at least in part as a response to the exercise of her constitutional rights." *Pickering v. Board of Educ.,* 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Cockrel v. Shelby County Sch. Dist.,* 270 F.3d 1036, 1048 (6th Cir.2001) (citing *Leary v. Daeschner,* 228 F.3d 729, 737 (6th Cir.2000)). To satisfy the first *Pickering* prong, a plaintiff must show that (1) his or her speech touched upon matters of public concern; and (2) his or her "interest in commenting on matters of public concern ... outweighs the interest of the state, as an employer, in promoting

the efficiency of the public services it performs through its employees." *Pickering,* 391 U.S. at 568, 88 S.Ct. 1731 (citations omitted). Once a plaintiff establishes the three *Pickering* elements, the burden of production shifts to the defendants, who must demonstrate, by a preponderance of the evidence, that they would have taken the same action in the absence of the protected conduct. *Leary,* 228 F.3d at 737 (quotation omitted).

In *Rodgers v. Banks,* 344 F.3d 587, (6th Cir.2003), we observed that "[w]hile public employees may not be required to sacrifice their First Amendment free speech rights in order to obtain or continue their employment ... a state is afforded greater leeway to control speech that threatens to undermine the state's ability to perform its legitimate functions." *Id.* at 596 (internal citations omitted). Speech concerns matters of public concern if it "relat[es] to any matter of political, social, or other concern to the community." *Connick,* 461 U.S. at 146. Stated otherwise, this Court must determine whether the relevant speech "involves issues about which information is needed or appropriate to enable the members of society to make informed decisions about the operation of their government." *Brandenburg v. Hous. Auth. of Irvine,* 253 F.3d 891, 898 (6th Cir.2001) (internal citations omitted). Therefore, speech that touches upon a matter of public concern includes speech that informs the public that the government failed to "discharg[e] its governmental responsibilities" or "bring [ing] to light actual or potential wrongdoing or breach of public trust [on the part of a governmental entity or any officials therein]." *Connick,* 461 U.S. at 148. In distinguishing between speech that touches upon a public concern versus private speech, we have stated that our focus is not on "what might incidentally be conveyed by the fact that the employee spoke in a certain way, [but] the *point* of the speech in question." *Dambrot v. Cent. Mich. Univ.,* 55 F.3d 1177, 1186 (6th Cir.1995).

In the instant case, the district court applied the foregoing principles and determined that, because Plaintiff's speech concerned an internal dispute. Plaintiff's speech was "the quintessential example of a matter of private concern." (J.A. at 23). We agree with the district court that, as a general matter, purely internal employee grievances are matters of private concern. *See Cockrel,* 270 F.3d at 1052 ("an employee grievance or some other private dispute" generally does not constitute a matter of public concern); *United States v. Nat'l Treasury Employees Union,* 513 U.S. 454, 466, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) ("speech that involves nothing more than a complaint about a change in the employee's own duties [which] may give rise to discipline without imposing any special burden of justification on the government employer" is unprotected speech). Plaintiff relies on this Court's opinion in *Banks v. Wolfe County Board. of Education,* 330 F.3d 888 (6th Cir.2003) for the proposition that Plaintiff's speech touched upon a matter of public concern. In *Banks,* this Court reversed the district court's grant of summary judgment to the defendants in part because the district court focused on the subjective intent of the Plaintiff in making the speech to determine whether the plaintiff's speech touched upon a matter of public concern. The plaintiff in *Banks* challenged the defendants' policies and procedures for hiring certified personnel after she was denied a certified teaching position, despite interviewing for several such positions. *Id.* at 890-91. The plaintiff sent several letters to the state Office of Education Accountability ("OEA") regarding what she perceived to be violations of state policy by the defendants. *Id.* at 891. The plaintiff was eventually transferred to another department allegedly in retaliation for conduct in challenging the defendants' policies and procedures. *Id.* A panel of this Court concluded that, although most of the plaintiff's allegations were personal in nature, "some of her allegations touched upon public concerns." *Id.* at 897.

Despite Plaintiff's efforts to fit the facts of this case within the ambit of *Banks,* we agree with the district court that none of Plaintiff's allegations touch upon a matter of public concern. [FN1] Unlike the *Banks* plaintiff, Plaintiff in the instant case merely alleges that Defendants' retaliatory treatment of her was based on Plaintiff's personal desire to see Schick dismissed. Plaintiff claims that after she reported her fear to Human Resources, Defendants at various times began to retaliate against her by ignoring her request that something be done about Schick, or by not taking action for the alleged retaliatory treatment she suffered from Kaplan. Plaintiff claims that her statements to Defendants concerned safety precautions at SHS, not a personal vendetta to see Schick and Kaplan disciplined. As the district court correctly noted, however. Plaintiff's statements to Human Resources and Defendants concerned only her desire to see Schick fired and Kaplan disciplined as a result of their treatment of Plaintiff. The letters that the *Banks* plaintiff sent to the OEA set forth allegations regarding policies and procedures at the defendants institution regarding a matter of public concern, making *Banks* unlike the instant case. Because Plaintiff does not sufficiently set forth specific allegations that her speech touched upon a matter of public concern, Plaintiff's speech was not protected speech; therefore, we need not conduct a balancing inquiry pursuant to *Pickering* to determine whether the district court erred in this matter. *See Pickering,* 391 U.S. at 568.

> FN1. At oral argument, counsel for Plaintiff analogized this case to *Chappel v. Montgomery County Fire Protection District No. 1.* 131 F.3d 564 (6th Cir.1997). *Chappel* is patently distinguishable, however. In *Chappel,* the plaintiff alleged that the defendants retaliated against him because he attended public meetings and voiced concern over the defendants'

mismanagement of the finances of the ambulance district. *Id.* at 568. As part of his speech against the defendants, the plaintiff accused officials in defendants' employ of absconding with public funds. A panel of this Court ruled that the plaintiff's speech was a matter of public concern because it concerned use of public funds. In the instant case. Plaintiff's alleged retaliatory treatment came about because she voiced her personal concern about her personal safety and the safety of others. However, Plaintiff's alleged safety concern arose in the context of a personal employment dispute, and the allegations were more personal in nature, and only tangentially concerned public safety.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's order granting Defendants' motion for summary judgment.

OBERDORFER, J., concurring.

I join in the result affirming the district court's grant of summary judgment for the defendants. Even assuming that **Serrato's** speech touched on a mater of public concern. I would hold, on the undisputed facts well-stated by the majority, that her First Amendment interest was "outweighed by the interest of the State, as an employer, in promoting the efficiency of the public services it performs," specifically the University Student Health Center's efficiency interest in providing its services to the students. *Chappel v. Montgomery Cty. Fire Protection Dist. No. 1.* 131 F.3d 564, 574 (6th Cir.1997) (internal quotation marks omitted). Although necessarily fact-bound and context-specific, this conclusion is soundly within the line drawn by Supreme Court and Sixth Circuit precedent. *See, e.g. Connick v. Myers,* 461 U.S. 138, 146, 103 S.Ct. 1684,

75 L.Ed.2d 708 (1983); *Leary v. Daeschner,* 228 F.3d 729, 739 (6th Cir.2000); *see also Fox v. District of Columbia,* 83 F.3d 1491 (D.C.Cir.1996), *on remand,* 990 F.Supp. 13 (D.D.C.1997). On this balancing theory, I join in the decision of my colleagues.

APPENDIX B

Case No: 03-3620

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

VIOLET SERRATO

Plaintiff – Appellant

v.

BOWLING GREEN STATE UNIVERSITY; JOSHUA KAPLAN; MARLENE REYNOLDS; JOANNE NAVIN; BRYAN BENNER

Defendants – Appellees

BEFORE: KEITH AND CLAY, CIRCUIT JUDGES; OBERDORFER* DISTRICT JUDGE

Upon consideration of the petition for rehearing filed by the Appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, clerk

*the Honorable Lewis F. Oberdorfer, United States District Judge for the District of Columbia, sitting by designation.

[No date appears on the order. The court's docket shows that the order was filed July 29, 2004.]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT,
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION.

Violet **SERRATO,** Plaintiff
v.
BOWLING GREEN STATE UNIVERSITY, et al.,
Defendants

No. 3:01-CV-7619.

March 24, 2003.

Thomas A. Sobecki, Toledo, OH, for Violet **Serrato,** Plaintiff.

Janine T. Avila, Connelly, Jackson & Collier, Tammy Geiger Lavalette, Connelly, Jackson & Collier, Toledo, OH, for Bowling Green State University, Joshua Kaplan, in his individual and official capacity, Bowling Green State University Student Health Service, Marlene Reynolds, in her individual and official capacity, Bowling Green State University Student Health Service, Joanne Navin, in her individual and official capacity, Bowling Green State University Student Health Service, Bryan Benner, in his individual and official capacity, Bowling Green State University Associate Vice President for Administration, Defendants.

ORDER

CARR, District Judge.

Plaintiff Violet **Serrato** brings this action against defendants Bowling Green State University ("BGSU"), and BGSU employees Joshua Kaplan, Marlene Reynolds, Joanne Navin,

and Bryan Benner in their individual and official capacities, asserting a claim under 42 U.S.C. § 1983 for retaliation in violation of the First and Fourteenth Amendment. This court has jurisdiction pursuant to 28 U.S.C. § 1331. This court dismissed the claims against BGSU and the four individual defendants in their official capacities. Pending is a motion for summary judgment brought by Kaplan, Reynolds, Navin, and Benner in their individual capacities. For the following reasons, defendants' motion shall be granted.

BACKGROUND

In August, 1990, BGSU hired plaintiff as a part-time clerk at BGSU's Student Health Services ("SHS"). By early 1995, plaintiff was a permanent full-time nine-month clerical specialist and worked at SHS's front desk. A full-time twelve-month clerical specialist position became available, and both plaintiff and fellow SHS clerical specialist Cheryl Schick applied for the vacancy.

On February 8-9, 1995, Schick reportedly told several other SHS employees that she "was very angry about [plaintiff] applying for a job that she also was applying for, and that she had made remarks that if she didn't get the job, that there were going to be a lot more openings at the front desk area, and that she was going to bring a gun in and kill her." (Pl. Depo. vol. 1 at 30- 31). Schick reportedly did not use plaintiff's name. Plaintiff did not see or hear Schick make any of the statements. The employees who heard the statements told plaintiff about them on February 9, 1995. Plaintiff believed the threats were directed at herself, because plaintiff and Schick were the only employees applying for the job.

The employees who heard Schick make the statements also reported them to the SHS Medical Director, defendant Joshua

Kaplan, on February 9, 1995. Kaplan was not plaintiff's direct supervisor, but was in her supervisory chain of command.

When he learned about Schick's statements, Kaplan contacted the campus police chief, the staff clinical psychologist, and BGSU Vice President Ed Whipple. Kaplan called Schick into his office to talk about the statements. She admitted making them, but said she did not have a gun and did not mean what she said. Kaplan told her that he had reported her to the police. Schick left for the day. Kaplan then told plaintiff and her clerical supervisor, Sherry Beeker, that he had contacted security, that he did not believe Schick meant the threat, and that no action would be taken against Schick. Plaintiff told defendant Kaplan that she was concerned for her safety, and Kaplan advised her to call campus security herself.

The next day, February 10, 1995, Beeker and plaintiff contacted campus security about Schick's threats. Campus security told them to contact BGSU Human Resources. Plaintiff alleges that Kaplan was angry when he found out she had contacted Human Resources, and alleges that is when the retaliation began. Kaplan then called Human Resources, which advised him to place Schick on administrative leave, with pay, effective immediately. He did so.

On February 13, 1995, plaintiff, Beeker, and two other employees prepared and signed a memorandum to Kaplan expressing safety concerns. That week, the four also met with the campus police chief, who told them they had no grounds to file charges against Schick. During the same week, the director of BGSU Human Resources, John Moore, visited the office and spoke to the employees, including plaintiff. Moore told them that Schick would be placed on administrative leave with pay while she sought counseling, and then she would be suspended

without pay for three weeks. Schick only would be allowed to return to work if her counseling reports were favorable.

Plaintiff says Kaplan told SHS employees that Schick would return to work at the front desk. She alleges that Kaplan told her that if she did not like his way of handling the situation, she could find employment elsewhere. Plaintiff says she brought up her safety concerns with Kaplan a number of times during the next two weeks. Kaplan did not have the authority to transfer Schick out of SHS, but when Schick returned to work, she began working on a different floor of SHS instead of at the front desk. Plaintiff, meanwhile, got the job for which she and Schick had applied, and became a permanent twelve-month employee on March 6, 1995.

In the Spring of 1995, plaintiff told Kaplan that she "was concerned Cheryl may be getting 'upset' again since summer was approaching and she would not be working." (Pl. Depo. vol. II exh. B at 2). Kaplan told her not to worry. Schick visited plaintiff's floor one day in July, 1995, to speak to another employee, and plaintiff asked Kaplan to keep Schick away from plaintiff's work area. Kaplan refused the request. Plaintiff alleges that in October, 1995, Schick again visited plaintiff's floor to make copies and bumped plaintiff with her shoulder while they were in a narrow passageway together. Kaplan then told Schick to stop visiting plaintiff's floor, even to make copies. Since then, Schick has not spoken inappropriately to plaintiff or about plaintiff, and has not offensively touched her. Plaintiff's concerns, however, continued.

In 1997, defendant Navin, SHS Associate Director, replaced Beeker as plaintiff's supervisor. Kaplan was Navin's supervisor. Plaintiff told Navin her safety concerns about Schick. Plaintiff alleges that Navin ignored her concerns, telling her to go back to work, and that the nurses Navin supervised at SHS started to

dislike her. In late 1998, defendant Reynolds, SHS Office Manager, replaced Navin as plaintiff's supervisor. Navin supervised Reynolds, and Kaplan continued to supervise Navin. Plaintiff told Reynolds her concerns about Schick and her concerns about perceived retaliatory treatment. Plaintiff alleges Reynolds and Kaplan stopped talking to her. Plaintiff alleges that Kaplan told his own supervisor, Tonia Stewart, that he believed plaintiff was crazy, and that he did not think Schick's threats had been serious.

Defendant Benner never was plaintiff's supervisor, but was scheduled to be deposed in a separate lawsuit plaintiff had filed. He learned of plaintiff's complaints about Schick while serving as BGSU's interim Human Resources Director from approximately April 1996 to 1997, and he was BGSU's Associate Vice President for Administration as of May 7, 2001. Plaintiff alleges that on that day, as she was about to cross a street, a car swerved towards her. She says Benner was a passenger in the car, and that she saw him laughing. She asserts that he must have told the driver of the car to swerve toward her as retaliation for deposing him. Plaintiff also alleges that Benner supported Kaplan in her grievances, and that this constituted retaliation.

Plaintiff alleges that as a result of "harassment, belittlement, and marginalization," she developed medical problems that forced her to leave SHS in 2000. (Doc. 48 at 2). She alleges that in late 1996, she had surgery and then wanted to return to work part-time; Kaplan would not let her do so until she complained to other university officials. She also alleges that Kaplan fired the student workers she supervised, and would not provide her with a written job description. She alleges that her supervisors gave her poor evaluations in retaliation. Also, between 1996 and 2000, plaintiff filed numerous grievances for

perceived retaliatory treatment, contested her performance evaluations, and appealed various decisions.

Plaintiff sued BGSU and the four individual defendants in their individual and official capacities. On February 28, 2002, this court granted defendants' motion to dismiss BGSU and the individual defendants in their official capacities, leaving only plaintiff's claims against the individual defendants in their individual capacities. The four defendants, in their individual capacities, have moved for summary judgment.

STANDARD OF REVIEW

Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Id.* at 323, 106 S.Ct. 2548. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (quoting Fed. R. Civ. P. 56(e)).

Once the burden of production shifts, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is insufficient "simply [to] show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Rather,

Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. *Celotex,* 477 U.S. at 324, 106 S.Ct. 2548.

In deciding the motion for summary judgment, the evidence of the non- moving party will be accepted as true, all doubts will be resolved against the moving party, all evidence will be construed in the light most favorable to the non-moving party, and all reasonable inferences will be drawn in the non-moving party's favor. *Eastman Kodak Co. v. Technical Servs., Inc.,* 504 U.S. 451, 456, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992). Summary judgment shall be rendered only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

DISCUSSION

Plaintiff claims that defendants retaliated against her for speech protected by the First and Fourteenth Amendments, in violation of 42 U.S.C. § 1983.

For plaintiff to establish a claim of First Amendment retaliation, she must demonstrate: 1) she was engaged in a constitutionally protected activity; 2) the defendants' adverse action caused her to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and 3) the adverse action was motivated at least in part as a response to the exercise of her constitutional rights. *Cockrel v. Shelby County Sch. Dist.,* 270 F.3d 1036, 1048 (6th Cir.2001); *Leary v. Daeschner,* 228 F.3d 729, 737 (6th Cir.2000). If the plaintiff can establish the three elements, the burden of persuasion shifts to the defendants, who must show,

by a preponderance of the evidence, that they would have taken the same action even in the absence of the protected conduct. *Leary,* 228 F.3d at 737 (quotation omitted).

To demonstrate that she was engaging in constitutionally protected speech, plaintiff must show: 1) her speech touched on matters of public concern; and 2) her "interest in commenting on matters of public concern ... outweighs the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Cockrel,* 270 F.3d at 1048 (citations omitted).

1. Matter of Public Concern

[1][2] In *Connick v. Myers,* 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), the Supreme Court held that matters of public concern are those that can "be fairly considered as relating to any matter of political, social, or other concern to the community[.]" The initial inquiry into determining whether a public employee's speech is a matter of public concern is a question of law. *Rankin v. McPherson,* 483 U.S. 378, 386 n. 9, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. *Connick,* 461 U.S. at 147- 48, 103 S.Ct. 1684.

In *Connick,* a public employee was discharged after circulating a questionnaire within her office, asking questions about employees' confidence and trust in their supervisors, the level of office morale, and the need for a grievance committee. The Court noted that the employee did not intend to inform the public that her office was not fulfilling its responsibilities, and did not seek to reveal actual or potential wrongdoing within the office or breach of the public trust; "[i]ndeed, the

questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo." 461 U.S. at 148, 103 S.Ct. 1684.

The Court held:

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

461 U.S. at 147, 103 S.Ct. 1684.

The Sixth Circuit, in construing this language in *Connick,* has held that the "key question is not whether a person is speaking in his role as an employee or a citizen, but whether the employee's speech in fact touches on matters of public concern." *Cockrel,* 270 F.3d at 1052. The court continued:

> Thus, even if a public employee were acting out of a private motive with no intent to air her speech publicly, as was the case with [plaintiff] Myers, so long as the speech relates to matters of 'political, social, or other concern to the community,' as opposed to matters 'only of personal interest,' it shall be considered as touching upon matters of public concern.

Id. (citing *Connick,* 461 U.S. at 146-49, 103 S.Ct. 1684).

[3] Consequently, it is irrelevant to this case that plaintiff arguably had a personal motive--her personal safety--in her speech. In *Chappel v. Montgomery County Fire Prot.,* 131 F.3d 564 (6th Cir.1997), the court held that "the argument that an individual's *personal* motives for speaking may dispositively determine whether that individual's speech addresses a matter

of *public* concern is plainly illogical and contrary to the broader purposes of the First Amendment." 131 F.3d at 574.

> Whether an employee's statement is predominated by 'the employee's personal interest *qua* employee' is primarily a content-based inquiry, not an exclusively motive-based inquiry. The fundamental distinction recognized in *Connick* is the distinction between matters of public concern and matters only of personal interest, not civic-minded motives and self-serving motives.

Chappel, 131 F.3d at 575 (citation omitted); *see also Johnson v. Univ. of Cincinnati,* 215 F.3d 561, 585 (6th Cir.2000) (same); *Perry v. McGinnis,* 209 F.3d 597, 608-09 (6th Cir.2000) (same). What is relevant is the subject of plaintiff's complaint. *Id.* at 609.

It also is irrelevant to this case that plaintiff privately expressed her concerns to other university employees, instead of in a public forum. An employee may arrange to communicate privately with his or her employer; this does not transform a matter of public concern into a matter of private concern. *Givhan v. W. Line Consol. Sch. Dist.,* 439 U.S. 410, 415-16, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979); *Perry,* 209 F.3d at 608.

The subject of plaintiff's speech was an internal employee dispute. An internal employee grievance is the quintessential example of a matter of private concern. *See, i.e., Connick,* 461 U.S. at 148, 103 S.Ct. 1684 (questions on internal office questionnaire about office morale and relationships with supervisors did not touch on matters of public concern); *Cockrel,* 270 F.3d at 1052 ("an employee grievance or some other private dispute" generally does not constitute a matter of public concern); *Lancaster v. Indep. Sch. Dist. No. 5,* 149 F.3d 1228, 1234 (10th Cir.1998) (employee made public statements about his formal reprimand; court held that where "plaintiff's grievances relate to an internal personnel dispute, then the

content is only of private concern."); *see also United States v. Nat'l Treasury Employees Union,* 513 U.S. 454, 466, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) (unprotected speech includes "speech that involves nothing more than a complaint about a change in the employee's own duties [which] may give rise to discipline without imposing any special burden of justification on the government employer.").

Conversely, courts have found that employees' speech touches on matters of public concern where the statements relate to matters of wide political interest. *See, i.e., Cockrel,* 270 F.3d at 1051 (employee's speech about the benefits of industrial hemp touched on matter of public concern); *Leary,* 228 F.3d at 737 (teachers' statements about student discipline and appropriate educational programs touched on matters of public concern); *Johnson,* 215 F.3d at 585 (employee's statements on the employer's failure to comply with its affirmative action program touched on matter of public concern); *Meyers v. City of Cincinnati,* 934 F.2d 726, 730 (6th Cir.1991) (speech about politically charged issue touched on matter of public concern).

The balance between matters of public concern and matters of private concern was illustrated in *Black v. Columbus Pub. Sch.,* 124 F.Supp.2d 550 (S.D.Ohio 2000). Plaintiff, a school employee, claimed retaliation for her allegations that the principal of her school was having an affair with a parent volunteer. While allegations of sexual misconduct at a middle school arguably could be of public concern, 124 F.Supp.2d at 581, the district court found that plaintiff's speech did not touch on matters of public concern, because, in context, it was motivated by personal concerns, "not based on a desire to alleviate a matter of public concern," and focused on how the misconduct affected her own job duties. *Id.*

[4] Taking the plaintiff's statements in the context in which they were made, it is plain that they did not relate to a matter of public concern. Plaintiff argues that because SHS was a university office, visited by students and other members of the public, threats of violence at the office constituted a matter of public concern. The Sixth Circuit has held that matters of public safety, generally, are "near [the] zenith" of public concern. *Chappel,* 131 F.3d at 578. Public safety, however, was not at issue when plaintiff spoke. If plaintiff had alleged that she was the victim of retaliation for informing Kaplan of the threat on February 9, 1995, she might have been able to argue that this statement touched on a matter of public concern. Plaintiff did not talk to Kaplan on February 9, however, until Kaplan had called security, ascertained that Schick's threat was not serious, and sent Schick home. Plaintiff's telephone call to campus security on February 10, 1995, arguably could have touched on a matter of public concern, because Schick was back in the office that morning. Plaintiff does not, in any event, allege retaliation for her February 9, 1995, statement of concern to Kaplan or for her February 10, 1995, call to security.

Instead, plaintiff alleges that the retaliation against her began when she contacted Human Resources to complain about Schick on February 10, 1995. When plaintiff called Human Resources, she could not have had the purpose of protecting herself or the public, nor could a call to Human Resources have had that effect. Taking plaintiff's statements in context, plaintiff's call to Human Resources was not regarding a matter of public concern, but instead regarding the internal disciplinary decisions of her superiors.

Any public interest in plaintiff's speech ceased after her superiors took action to avert the threat Schick may have posed. In all of her subsequent statements to Kaplan, Navin, and Reynolds, plaintiff only alleges that she disagreed with Schick's

punishment. Because internal employee disciplinary matters are not of public concern, plaintiff's statements of disagreement did not touch on a matter of public concern.

The record shows that Schick's supervisors, BGSU Human Resources, BGSU security officers, and a counselor agreed that Schick did not present a threat to plaintiff or anyone else after Schick's suspension, counseling, and transfer. Properly construed, plaintiff's statements were merely statements of disagreement with the disciplinary action BGSU officials took against Schick for making the threat. Tellingly, plaintiff has not alleged that she sought any other remedy to alleviate the danger she perceived, except further disciplinary action against Schick. For example, the February 13, 1995, letter to Kaplan from plaintiff and three other SHS employees reads, in pertinent part:

> Action should have been taken immediately to remove [Schick] from the SHS to alleviate anxiety which many employees felt over this. Really it is our opinion that when these comments were brought to your attention and then confirmed by other staff, removal, transfer or other action should have been immediate and swift.... We as employees under your supervision want you to take her threats against people serious and *follow through with disciplinary action.*

(Def.Exh. C) (emphasis added). On the date this letter was written, Schick already had been placed on leave.

Plaintiff alleges that on August 17, 1995, she approached Kaplan and "explained to him in great detail how I felt this matter was not handled properly and the main concern had been more toward keeping bad [public relations] from getting out than the safety of the employees[.]" (Pl. Depo. vol. II exh. B p. 2). This statement seems to accuse him of mishandling Schick's threats, an accusation that arguably could concern the public. However, read in context, as it must be read, the statement expressed private concerns. Plaintiff continues:

> Dr. Kaplan informed me Cheryl Schick would be returning upstairs [at SHS] on August 28 for thirty days and then she would be put in a pool where she could bump another Clerical Specialist with less seniority. He said if I did not feel safe working there then I should quit my job. Dr. Kaplan also told me that Cheryl's psychological reports were all favorable and she was cleared to return to work by her psychologist. He also said he was not comfortable with Cheryl returning and he had tried to get her out of the area, but the decision had been [made by the Vice President for Student Affairs].

Id. at 2-3. In context, plaintiff's statement expressed nothing more than disagreement about Schick's continued employment at BGSU.

Later, plaintiff's speech expanded to include allegations of retaliation, but because the plaintiff has failed to allege these statements with any specificity, it is impossible to evaluate whether they, too, arguably may have touched on matters of public concern. A fair reading of the record, however, does not support any inference that plaintiff's allegations of retaliation touched on matters of public concern. In all of plaintiff's written and oral communications with defendants, she appears to have been pursuing a personal interest: namely, a desire to see Schick fired.

2. Balance of Interests

Even if any of plaintiff's speech touched on a matter of public concern, it was not constitutionally protected. If "any part of an employee's speech, ... relates to matters of public concern, the court must conduct a balancing of interests test as set forth in *Pickering* [.]" *Rahn v. Drake Ctr., Inc.,* 31 F.3d 407, 411 (6th Cir.1994). Under *Pickering,* none of plaintiff's speech was constitutionally protected unless her interest in speaking outweighed "the interest of the State, as an employer, in

promoting the efficiency of the public services it performs through its employees." *Pickering,* 391 U.S. at 568, 88 S.Ct. 1731. The court should consider the content, form, and context of the statements in making this determination. *Speers v. University of Akron,* 189 F.Supp.2d 759, 771 (N.D.Ohio 2002).

The Sixth Circuit has stated that in applying the *Pickering* balance-of- interests test, a court should "consider whether an employee's comments meaningfully interfere with performance of her duties, undermine a legitimate goal or mission of the employer, create disharmony among co-workers, *impair discipline by superiors,* or destroy the relationship of loyalty and trust required of confidential employees." *Cockrel,* 270 F.3d at 1053 (citations omitted) (emphasis added).

Plaintiff's comments were intended to "impair discipline by superiors." *Id.* She disagreed with the disciplinary sanctions imposed against Schick, and urged her superiors to take stronger measures. Even if internal employee disciplinary sanctions constituted matters of public interest, plaintiff's interest in expressing her disagreement with Schick's punishment is not as strong in the university's interest in enforcing its chosen disciplinary sanctions against Schick, free from the unsolicited advice of Schick's co- workers. For the university, the "efficiency of the public services it performs through its employees" depends, in part, upon the ability of its supervisors to resolve internal employee disputes, and that efficiency is undermined when employees repeatedly question their decisions. In *Connick,* the Court stated that "government offices could not function if every employment decision became a constitutional matter." 461 U.S. at 143, 103 S.Ct. 1684. The evidence in this case shows that the SHS was beset with numerous personnel problems as a result of plaintiff's grievances and accusations, and that these problems impaired the office's operations.

The plaintiff's questionnaire in *Connick,* with the exception of one question, was intended "to gather ammunition for another round of controversy with her superiors." 461 U.S. at 148, 103 S.Ct. 1684. In this case, the evidence shows that plaintiff had a similar intent. As the Court stated in *Connick,* the publication of plaintiff's questionnaire only would show that a "single employee is upset with the status quo." 461 U.S. at 148, 103 S.Ct. 1684. The airing of plaintiff's grievances in this case show exactly that, as well. An employer is not required to "tolerate action which he reasonably believe[s] would ... undermine his authority[.]" *Connick,* 461 U.S. at 154, 103 S.Ct. 1684. By refusing to accept the decision of Kaplan and Human Resources to suspend and transfer Schick, plaintiff undermined the authority of her superiors.

In sum, plaintiff has not alleged retaliation for alerting anyone of danger, only for her independent attempts to influence the university's decision about Schick's disciplinary sanctions. Consequently, I find that plaintiff has alleged retaliation for making statements: 1) that did not relate to matters of public interest; and 2) in which her interest was outweighed by the interests of her superiors. Because those statements fail both parts of the test for determining constitutional protection, the motion for summary judgment on plaintiff's § 1983 claim for retaliation must be granted. [FN1] This court need not consider whether the alleged campaign of harassment against plaintiff constituted adverse action, or whether any such harassment was caused by plaintiff's statements, because plaintiff did not engage in constitutionally protected activity.

FN1. Though plaintiff does not clearly state it, the record shows that plaintiff's claim against Benner also alleges retaliation for plaintiff's deposition of him in a separate lawsuit. Even assuming that deposing Benner was

constitutionally protected activity, however, plaintiff's bare allegation that Benner told a driver to swerve at her is not enough to defeat his motion for summary judgment. Plaintiff has produced only her own speculative assertions, rather than proof that Benner told the driver to strike her. Consequently, she cannot show the elements of adverse action and causation.

CONCLUSION

Because plaintiff has not presented evidence from which a reasonable jury could conclude that her statements touched on matters of public interest and outweighed the interests of defendants in the efficient operation of SHS, she has failed to demonstrate that she engaged in constitutionally protected activity. Because her § 1983 claim depends on such a showing, plaintiff cannot prevail, and summary judgment must be granted. Summary judgment also must be granted on plaintiff's retaliation claim against Benner, because she has failed to produce any proof that the alleged swerving incident occurred.

It is, accordingly, ordered that:

1) Defendants' motion for summary judgment be, and the same hereby is, granted.

So ordered.

/s/ James G. Carr
James G. Carr
United States District Judge